

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

KEYSE G. JAMA, :

Petitioner :

v. : No. 03-674

IMMIGRATION AND NATURALIZATION :

SERVICE. :

- - - - -X

Washington, D.C.

Tuesday, October 12, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:00 a.m.

APPEARANCES:

JEFFREY KEYES, ESQ., Minneapolis, Minnesota; on behalf of
the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JEFFREY KEYES, ESQ.	
On behalf of the Petitioner	3
MALCOLM L. STEWART, ESQ.	
On behalf of the Respondent	23
REBUTTAL ARGUMENT OF	
JEFFREY KEYES, ESQ.	
On behalf of the Petitioner	49

P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-674, Keyse Jama v. the INS.

Mr. Keyes.

ORAL ARGUMENT OF JEFFREY KEYES

ON BEHALF OF THE PETITIONER

MR. KEYES: Mr. Chief Justice, and may it please the Court:

The Eighth Circuit's decision that petitioner, a citizen and a national of Somalia, can be deported to Somalia should be reversed.

The applicable removal statute requires acceptance from the country of which the alien is a subject, national, or citizen. That statute is 8 U.S.C. 1231(b)(2)(D) as in David, which we have referred to as step two.

The Eighth Circuit acknowledged that acceptance is required for such a removal. The parties agree that Somalia has no functioning government that can give acceptance in this case, as that term is used in the statute.

CHIEF JUSTICE REHNQUIST: Mr. Keyes, we're not talking about removability here, are we, I mean, in the sense that a dispute over whether he could be removed?

1 It's just a question of where he can be removed to.

2 MR. KEYES: That is correct, Your Honor.

3 The circuit court ruled, however, that
4 petitioner could be deported to Somalia because the
5 statute provides that if the alien is not removed to his
6 country of citizenship, then he can be removed to a list
7 of additional countries in the next step of the statute,
8 1231(b)(2)(E), including the country of birth. The
9 circuit court erred in that ruling for the following
10 reasons.

11 JUSTICE GINSBURG: May I ask you preliminarily,
12 Mr. Keyes? The Government takes the position that this
13 statute, whatever it means, was intended to -- with the --
14 with the nation abroad in view, that the idea was not to
15 insult our -- our neighbors in the world community, so to
16 recognize that they have the prerogative to say yes or no
17 to somebody being sent there, being removed there, but
18 that the statute was not intended to confer any benefit on
19 the removable alien.

20 MR. KEYES: Your Honor, the -- the statute, as
21 structured, sets forth -- Congress has set forth order
22 with respect to the deportation process, has set forth,
23 for example, the order in which countries should be
24 chosen, the identity of those countries that should be
25 chosen. The -- the statute is -- does get at order in the

1 deportation process, and if an alien is being removed to
2 -- in a situation where there is no government to receive
3 the alien, where the alien is simply being expelled from
4 the United States, the risk arises that the alien will
5 bounce back to the United States, will simply be in
6 international traffic with no country to receive the
7 alien, and there's nothing in the statute which would
8 indicate that the interest of Congress in ordering the
9 removal process is limited simply -- limited simply to a
10 concern about the sovereignty of nations of the other
11 country.

12 CHIEF JUSTICE REHNQUIST: But you need more than
13 that, don't you? Are you saying there's no interest --
14 indication that Congress was concerned with other than the
15 subject that it was talking about? But -- but you need
16 something affirmative to say that a statute confirms a
17 right on a private individual.

18 MR. KEYES: Mr. Chief Justice, the -- the -- we
19 are not contending that the -- the statute invests a right
20 on the individual. What we are contending is that the
21 statute was -- as expressed in the statute has this
22 acceptance requirement that would apply to the removal
23 process.

24 JUSTICE O'CONNOR: Well, but it is possible to
25 read the statute, particularly part (E), the first series

1 of subsections of it, as the Eighth Circuit did. That is
2 a possible reading of the statute and to find there is
3 not, indeed, an acceptance requirement under many of those
4 little subsections.

5 MR. KEYES: Your Honor, I would -- I would
6 suggest that --

7 JUSTICE O'CONNOR: Or I should say clauses
8 perhaps.

9 MR. KEYES: Yes, yes. I would -- I would
10 suggest that to -- to give it that reading, one has to
11 limit the view to the first six clauses.

12 JUSTICE O'CONNOR: Yes.

13 MR. KEYES: However, the -- I would suggest that
14 that would -- that would take subparagraph (E) out of --
15 out of its context, and there are several very important
16 -- there's important --

17 JUSTICE O'CONNOR: Well, I -- I'm not sure
18 that's right. When I read the statute as a whole and went
19 through all the possibilities there and got to (E), it
20 read as though, at the end of the day, Congress did want
21 to provide some place of removal for people in the absence
22 of acceptance.

23 MR. KEYES: Your Honor, I would -- I would
24 suggest that that -- that is -- that's not the case for
25 the following reasons, that first of all, the way (E)

1 begins, it says, if an alien is not removed to a country
2 under the previous subparagraphs.

3 JUSTICE O'CONNOR: Right.

4 MR. KEYES: The first priority is -- before that
5 is country of subject, nationality, or citizenship where
6 there is an acceptance requirement. In moving to (E) --

7 JUSTICE O'CONNOR: Obviously Congress
8 prefers to have our country act with acceptance. That --
9 that's understandable, but what (E) appeared, to me at
10 least, to be was if all those things had been exhausted,
11 we're going to still allow removal under little subclause
12 (i), (ii), (iii), (iv), and (vi).

13 MR. KEYES: Your Honor, the -- the -- what (E)
14 does is that it doesn't change the removal process. It
15 just adds for the -- for the executive branch, it adds
16 additional countries, other countries, that they can
17 remove to.

18 JUSTICE SCALIA: Well, but it doesn't begin that
19 way. It doesn't begin if an alien cannot be removed to a
20 country under the previous subparagraphs. It says, if an
21 alien is not removed to a country under the previous
22 subparagraphs. And whether he is or not is subject to the
23 discretion of the Attorney General. None of those
24 subparagraphs requires removal to those
25 countries.

1 MR. KEYES: Your Honor --

2 JUSTICE SCALIA: So when it says if he is not,
3 then the -- the Attorney General has these additional
4 options. I mean, you -- you'd have a stronger argument if
5 it -- if it read cannot be removed, but it doesn't.

6 MR. KEYES: Your Honor, the -- the -- when it
7 says, if an alien is not removed to a country under the
8 previous subparagraphs, that -- that is moving to give the
9 Attorney General additional countries to remove to. It
10 doesn't change the process. Look, for example -- I think
11 we get further guidance on that point by looking at clause
12 (vii) which is obviously a part of -- of this subparagraph
13 (E), which ends with the words, another country whose
14 government will accept the alien into that country.
15 Another country whose government will accept the alien
16 into that country. What that -- what that does is that it
17 gives us -- it references back to the first six clauses
18 and reflects the fact that the acceptance requirement is
19 always present.

20 JUSTICE SCALIA: Of course, well, I mean, that
21 clause could -- could be read either way. Another country
22 whose government will accept the alien is one way to read
23 it, and another way to read it is another country whose
24 government will accept the alien.

25 MR. KEYES: It is -- it is --

1 JUSTICE SCALIA: And that's -- that's the --
2 that's the ambiguity there.

3 MR. KEYES: It -- it does depend upon the
4 emphasis that you give, but I would suggest that if we are
5 going to -- if we are going to read (E) to mean that what
6 the Congress intended was that you're going to have an
7 acceptance requirement for removal under (D), step two,
8 the subject, nation, or citizenship country, but then
9 we're going to move to (E) and we're going to give you a
10 list of other countries that are presumably less -- or
11 have a less closer connection to the alien than in (D).
12 And with respect to those countries, those ones that are
13 just in clauses (i) through (vi), we're not going to have
14 any acceptance requirement. But then we're going to put
15 it back in in clause (vii) if -- when you have to go then
16 to some other country to get acceptance. I would suggest
17 that that is not a -- a sensible reading of the --

18 JUSTICE BREYER: Do you know why? Did you come
19 across anything that explained why there was a change in
20 language in that clause (vii) between the 1952 version and
21 the present one? The '52 one said, to any country which
22 is willing to accept such alien into its territory, and
23 then (vii) said, another country whose government will
24 accept the alien.

25 MR. KEYES: I -- I -- we didn't --

1 JUSTICE BREYER: Do we know -- is there
2 anything? Is that an accident, a drafting -- just simply
3 drafting style or something or --

4 MR. KEYES: It -- it -- we didn't find anything
5 that explained why. I would -- I would suggest that it
6 reinforces my point and that is --

7 JUSTICE BREYER: Yes, it does. It helps you
8 quite a lot that it says government, but it doesn't -- at
9 the same time it doesn't -- it -- it doesn't help you in
10 respect to whether (vii) applies to the first six. It
11 does help you in respect to if you win that point, that's
12 it because there's no government.

13 MR. KEYES: That's -- that -- that is
14 correct.

15 JUSTICE BREYER: Otherwise, you could argue --

16 MR. KEYES: That is correct. The -- the -- we
17 -- we did in the -- there is in one of the amicus briefs
18 that goes -- that gives the legislative history, there is
19 a reference to the major report of the Judiciary Committee
20 in connection with the '96 legislation, which says that
21 this whole section of the -- of the INA is being -- is
22 restating the -- the previous law. So -- so that's what
23 -- that's what we have.

24 JUSTICE SOUTER: One -- one argument in -- at
25 least in my view, that would certainly help you in your

1 reading of (E) is the interpretation that you put on (D).
2 And -- and you and Justice Scalia, I -- I think, have two
3 very different interpretations of what (D) requires.

4 You're saying that -- that (D) does, in fact,
5 require a -- a -- the -- the country -- if -- if the
6 Attorney General designates the -- the country of
7 citizenship, that there is a requirement in (D) that the
8 -- that the country accept.

9 Whereas, his earlier question that -- that spoke
10 of -- of -- and the issue under (E) is whether an alien is
11 or is not removed as opposed to can or cannot be removed.
12 His earlier question indicates the -- the possible reading
13 that there is no acceptance requirement in (D).

14 And as I understand the Government's argument,
15 it is -- it is this, that (D) requires the Attorney
16 General to turn to the country of -- of citizenship, but
17 if the country of citizenship does not accept or does not
18 respond, it is not the -- the consequence is not that the
19 Attorney General cannot deport to that country, but simply
20 that he is no longer required to, that it is an act of
21 discretion.

22 What is -- what is your answer to that argument,
23 that there is no absolute acceptance requirement, merely
24 an acceptance requirement to maintain the Attorney
25 General's obligation to return him to that country?

1 MR. KEYES: Two reasons, Your Honor. First of
2 all, it's the language of (D). It says, remove to
3 subject, national, or citizenship country unless the
4 government of the country does not affirmatively inform
5 about acceptance or -- or --

6 JUSTICE SOUTER: Well, it says the Attorney
7 General shall remove unless. And their argument is if --
8 if you don't get the condition satisfied, i.e.,
9 acceptance, there's no longer a mandate, i.e., shall. It
10 simply leaves it open, a matter of discretion.

11 MR. KEYES: And -- and I would -- I would
12 suggest that the -- the consequence of the unless language
13 should be that unless this happens, don't do it. But --
14 but -- so that would be my -- my suggested reading of the
15 language.

16 But the second reason, going to the structure of
17 the statute, which I think reinforces that and -- and is
18 important, is that if it had been -- if it had been
19 Congress' intent that if the Government couldn't remove to
20 the country of citizenship because it couldn't get
21 acceptance, that it could then move to step (E) and remove
22 anyway to overcome that acceptance, Congress would not
23 have gone about writing the statute the way that it did.
24 The way that it wrote the statute is that it provided in
25 (E) for other countries that the -- that the Attorney --

1 Attorney General could remove to, and every one of those
2 countries can be a different country than the country of
3 citizenship by their definition. It would -- it would
4 have been a very strange way for the -- the Congress to
5 have given the Attorney General the discretion to remove
6 anyway, to make it contingent upon one of those countries
7 in clauses (i) through (vi) to happen to be the same
8 country as the country of subject, nationality, or
9 citizenship.

10 JUSTICE SCALIA: What I think is very strange is
11 the -- is -- is for you to read back up to all the other
12 clauses, (i) through (vi), the phrase, whose government
13 will accept the alien. I mean, if -- if acceptance is a
14 condition for all of those preceding things, my goodness,
15 that's certainly not the way to make it clear, to tag it
16 onto (vi) instead of putting it in the introduction or in
17 a clause that comes after (i) through (vii) and goes out
18 to the margin after that. You -- you want us to read back
19 to (i) through (vi) whose government will accept the
20 alien.

21 MR. KEYES: The -- the -- I think that the --
22 the best way to approach the statute -- and I think it --
23 it can -- it can shed light on -- on your question -- is
24 that if we start with the premise that what removal is is
25 the transfer of the alien from the Government of the

1 United States to the government of the country of removal.
2 And that is what removal is. So if we start with that
3 premise, then it makes absolute sense here that there
4 wouldn't be at each place where the -- the statute
5 identifies a -- a country, where the statute would have to
6 say -- make a specific reference to the acceptance
7 requirement.

8 My point about reading the statute that way, in
9 terms of its general condition, is that it explains how
10 throughout the statute you would have the -- the reference
11 to acceptance in the context in which it appears, but you
12 wouldn't have to repeat it every place where you -- where
13 you referenced a country of removal.

14 JUSTICE SCALIA: So -- so, as you read -- as you
15 read this statute, the United States can never send
16 somebody back to a country that doesn't want them. Is
17 that it?

18 MR. KEYES: It would -- in -- in this removal
19 process, it does require acceptance from the country of
20 removal. Now -- now, they --

21 JUSTICE SCALIA: Why -- why would -- why would
22 Congress ever want to impose that categorical requirement?

23 MR. KEYES: The -- the reason why it -- it would
24 fit in with the -- with the statute is that Congress has
25 in this statute has expressed an interest in the orderly

1 process of deportation. If -- if it -- let's take two
2 examples, Your Honor.

3 If the -- if the country of removal refuses,
4 does not want to have -- will -- will not take the alien
5 back -- there is a government and they refuse -- then the
6 -- the reason why it makes sense to have this acceptance
7 requirement is that in all deportations, it will make it
8 less likely that the deportee is going to be bounced
9 around in international traffic and come back to the
10 United States.

11 CHIEF JUSTICE REHNQUIST: Can the -- can the
12 alien challenge a decision by the Attorney General that,
13 yes, a certain country has accepted him?

14 MR. KEYES: The -- I -- I -- if there is a -- if
15 there was a wholly unreasonable claim by the Government
16 that there was acceptance, they -- not --

17 CHIEF JUSTICE REHNQUIST: So -- so the alien can
18 litigate that issue.

19 MR. KEYES: I think that the alien can if the --
20 if the Government were to take a position -- let's say in
21 -- in -- in a -- in -- in this case the Government agrees,
22 admits that there is no acceptance. But let's say that
23 the Government took the position to say that we can -- we
24 can call anything acceptance and we can -- we can ship you
25 out of the United States with a wholly unreasonable

1 definition of acceptance. Then the alien should in that
2 circumstance be able to have access to the courts to be
3 able to challenge that -- that decision.

4 JUSTICE STEVENS: It seems rather strange to me.
5 If you take him to the airport, he either gets off the
6 plane or he doesn't. I don't see why you litigate that.
7 You know whether they'll accept him or not when you --
8 when you deliver him.

9 MR. KEYES: Well, you -- you should know that
10 because that is the -- the acceptance is the willing
11 receipt of the -- of the alien by the country of removal.

12 JUSTICE BREYER: What happened in China? I
13 mean, what -- this all comes from the '52 act, and it was
14 a big issue then that we didn't recognize communist China
15 and they would take people to the border. How -- how did
16 that work? Were there -- were there instances under the
17 '52 act where they just would take somebody to Macau or
18 something and push him across the border, or what -- what
19 happened? How did it work?

20 MR. KEYES: The -- the instances we know about
21 come from the -- from the Tom Man case, which was decided
22 by the Second Circuit in 1958. And in that case, what the
23 Government wanted to do was to take the alien to the
24 border of the -- of communist China and to see whether or
25 not they could get him across the border. And in the --

1 and -- and in construing this -- this very provision in
2 the language that it was in in 1952, Judge Learned Hand
3 for the -- for the court said that -- that acceptance was
4 required under step three for each of the subparts and
5 that that would violate the statute.

6 We know of other instances, Your Honor, to
7 answer the question, in terms of procedures where in -- in
8 the 1950's, '60's, that the -- what the Government would
9 do would be to take the -- remove the alien to Hong Kong
10 and then there were situations where the Hong Kong
11 authorities may or may not send that alien on to -- on to
12 China.

13 But there was -- there has always been -- every
14 opinion from the -- from the time this statute went into
15 effect in 1952, up until the Eighth Circuit's decision in
16 Jama, has said that what this statute means at each of its
17 steps is that acceptance is required.

18 JUSTICE BREYER: Now, are there instances where
19 we have deported people to places that they said, no, we
20 won't take him, and we have anyway?

21 MR. KEYES: We don't -- we don't know of any,
22 and the -- and the Government has -- has not cited --

23 JUSTICE SCALIA: And you say there can't be any
24 under this law.

25 MR. KEYES: We say there can't be.

1 JUSTICE SCALIA: So that if some state opens its
2 prisons and puts its criminals on a boat and sends them to
3 the United States, as has happened in the past, your
4 interpretation of this statute is that Congress has
5 forbidden the President from shipping these criminals back
6 where they came from, so long as the country that expelled
7 them doesn't want these criminals back. Is that --

8 MR. KEYES: No, Your Honor.

9 JUSTICE SCALIA: What -- what are you saying?

10 MR. KEYES: The reason for that is that this
11 statute deals with the removal of aliens who have been
12 through removal proceedings. In that situation,
13 presumably what would happen is that those -- those aliens
14 would be excluded. They would be subject to -- probably
15 to expedited removal under a different statute. We're
16 dealing here with aliens who have been admitted into the
17 United States.

18 JUSTICE KENNEDY: Is the statute so limited?

19 MR. KEYES: It -- it -- yes, it does. The --
20 the statute does. It starts in -- in (2), 1231(b)(2)(B),
21 other aliens, and (1) is arriving aliens who are in
22 removal proceedings.

23 JUSTICE GINSBURG: The United States has turned
24 boats back. The most notorious case was in World War --
25 before World War II --

1 MR. KEYES: Yes.

2 JUSTICE GINSBURG: -- before we entered World
3 War II.

4 MR. KEYES: It -- it has.

5 And -- and given the fact that this statute was
6 originally passed in 1952, in 1952 there was a -- we know
7 from the legislative history, there was enormous concern
8 about the fact that the -- the communist countries would
9 not receive back their citizens. So the concern was that
10 we had communist agents or aliens in the United States and
11 we couldn't deport them.

12 What Congress did in this statute was that -- in
13 1952 is that it -- it didn't change the acceptance
14 requirement, but what it did do was it expanded the list
15 of countries to which the Government could deport. Those
16 are the countries we now have --

17 JUSTICE BREYER: But what's bothering me partly
18 in this case is it's being argued on the ground that this
19 is like a country that says we don't want him. In fact,
20 this is a country that hasn't said we don't want him.
21 It's a country that hasn't said anything. It's not a
22 country perhaps. And -- and that's what -- really the
23 issue is whether or not a place without a government is a
24 place where you can send him at all.

25 MR. KEYES: Yes.

1 JUSTICE BREYER: And -- and maybe this is all
2 evidentiary when they changed the word -- add the word
3 government, that the word country throughout is simply
4 assuming a place that has an organized government. Is
5 there -- is that so? Is there anything you want to say
6 about that?

7 MR. KEYES: There is. Yes, it -- it does mean
8 -- that is a separate reason why the -- under -- under (E)
9 the petitioner cannot be removed to Somalia because there
10 is -- it's not a country as that should be properly
11 defined in the statute. And -- and let me give you, I
12 think, a good history on that.

13 The Board of Immigration Appeals itself in -- in
14 1985 in the Linnas case, specifically addressing in (E)
15 the term country, said that to be a country under this
16 statute, there had to be two things: a territory and
17 there had to be a functioning government that exercised
18 sovereignty over its people.

19 JUSTICE BREYER: Now, the word country
20 probably appears in the immigration statute in the
21 context of deportation since the first statute that
22 provided it. So have you done any work on that? I -- I
23 hate to sort of have to look that up for the first time,
24 but the -- the -- is there any work that you can report in
25 respect to that word country? There never under that --

1 the easiest thing for you would be if -- if this word
2 country -- there never has been under a statute that used
3 the word country a deportation to a place that had no
4 organized government.

5 MR. KEYES: Well, I --

6 JUSTICE BREYER: If you could affirm that that's
7 so, then that would be very strong for you. But maybe
8 that isn't so.

9 MR. KEYES: I -- I don't -- I don't know if --
10 if that is so. I can point to and we have pointed to in
11 -- in the briefs to a whole series of cases. I -- I
12 mentioned the BIA decision, but there's a whole series of
13 cases in the -- in the 1950's, 1960's which said that
14 country had to have a functioning government.

15 I'll -- I'll give you one -- one good example
16 and that is the Ying case where -- where the court,
17 circuit court, said that it was dealing with whether Hong
18 Kong could be a -- a country. And it said Hong Kong can
19 be because it has the following characteristics. It has a
20 legislative body. It has -- it has all the
21 characteristics of a political organization.

22 JUSTICE GINSBURG: I thought the Government said
23 you -- you didn't raise this question below, that you
24 didn't argue that Somalia wasn't a country.

25 MR. KEYES: Your Honor, it -- it -- this is --

1 this is not a new claim or a new issue. It is an argument
2 on the issue that is presented, which is whether
3 petitioner can be removed to the country of birth under
4 (E) when there is no functioning government that can
5 either object or accept him. And since there is no
6 country, he can't be.

7 CHIEF JUSTICE REHNQUIST: Well, but that doesn't
8 seem to be the question you actually presented in your
9 petition for certiorari.

10 MR. KEYES: Well, Your Honor, I would -- I would
11 quote the -- the Government's phrasing of the question in
12 -- in --

13 CHIEF JUSTICE REHNQUIST: Well, but you're --
14 you're bound by the question that you presented, and it is
15 whether the Attorney General can remove an alien to one of
16 the countries designated in the statute without obtaining
17 that country's acceptance of the alien prior to removal.
18 Now that doesn't say anything about the absence of a
19 government.

20 MR. KEYES: Your Honor, it -- it doesn't
21 specifically say --

22 CHIEF JUSTICE REHNQUIST: It doesn't say
23 specifically or generally.

24 MR. KEYES: It -- it -- what I would say is that
25 the -- that if you don't -- if there is no government in that

1 country, then there can be no acceptance. So we must
2 refer back to that.

3 I would also cite the fact, Your Honor, that
4 this issue was specifically addressed by the -- by both
5 parties in the district court. It -- and the -- in the
6 dissenting opinion in the Eighth Circuit, the -- the
7 dissent specifically raised this as -- as a matter in
8 terms of --

9 CHIEF JUSTICE REHNQUIST: Was it addressed by
10 the majority opinion?

11 MR. KEYES: It was not addressed by the majority
12 opinion, no, Your Honor.

13 I would -- I would -- if there are no further
14 questions at this time, I'd like to save the rest of my
15 time for rebuttal.

16 CHIEF JUSTICE REHNQUIST: Very well, Mr. Keyes.

17 Mr. Stewart, we'll hear from you.

18 ORAL ARGUMENT OF MALCOLM L. STEWART

19 ON BEHALF OF THE RESPONDENT

20 MR. STEWART: Mr. Chief Justice, and may it
21 please the Court:

22 The plain language of 8 U.S.C. 1231(b)(2)(E)(iv)
23 authorizes removal of an alien to his country of birth,
24 and it is undisputed that petitioner was born in Somalia.
25 By its terms the statutory authorization is not

1 conditioned on acceptance by the receiving country's
2 government.

3 JUSTICE SCALIA: Why -- why did you narrow the
4 question presented in your brief if you're willing to take
5 that -- that much more categorical position and much more
6 important position for the Government? When -- the -- the
7 question presented, as you describe it in your brief, is
8 whether immigration officials may remove petitioner to his
9 country of birth when that country lacks a functioning
10 central government that is able either to accept or object
11 to petitioner's -- that's a much narrower question --

12 MR. STEWART: I mean --

13 JUSTICE SCALIA: -- than -- than the one
14 presented by petitioner.

15 MR. STEWART: We -- we narrowed it in that way
16 because we feel that that's the only question that is
17 squarely before this Court. That is, the Court --

18 JUSTICE SCALIA: That's all you want us to
19 decide?

20 MR. STEWART: Well, we've also indicated that
21 the -- the logical thrust of most of our arguments is to
22 the effect that an individual could be removed to an
23 otherwise permissible country, notwithstanding the lack of
24 acceptance of a functioning central government.

25 JUSTICE SCALIA: Well, I -- I don't think it's

1 the logical thrust necessarily, and if we -- if we did it
2 the way your question presented suggests, we're deciding
3 this case only for people who are going to be deported to
4 Somalia or -- what other areas of the world have no
5 functioning government?

6 MR. STEWART: Somalia is the only one, and --

7 JUSTICE SCALIA: That's -- I wouldn't have voted
8 to take the case.

9 JUSTICE BREYER: So it's much narrower.

10 MR. STEWART: Well, obviously we -- we opposed
11 the certiorari petition. So we're not contending that the
12 practical importance of the question is such that it would
13 necessarily justify the Court's expenditure of its
14 resources. There was a square circuit conflict --

15 JUSTICE O'CONNOR: Yes, but it -- it's very odd
16 when the petitioner's question was broader and turned on
17 whether there was acceptance or not.

18 MR. STEWART: Well, I think our -- the reason --
19 one of the reasons we framed the question as we did is
20 that petitioner's last argument in the brief was, as we
21 read it, to the effect that whatever the text of the
22 statute might say, there has been an established
23 understanding over the decades that removal is not
24 permitted in the absence of acceptance by the receiving
25 country's government. And part of the point we wanted to

1 make is we don't think an understanding of that sort could
2 trump the test -- the text. But even if the Court decided
3 that the established understanding was so pervasive that
4 an extratextual limitation on removal authority should be
5 read in, the understanding could be thought to exist only
6 in cases where there was a functioning central government
7 that resisted the alien's return.

8 JUSTICE BREYER: As I -- as I understand it,
9 following up a bit on Justice Scalia, the question
10 presented is whether he can remove an alien to one of the
11 countries designated without obtaining that country's
12 acceptance. Okay?

13 MR. STEWART: Without --

14 JUSTICE BREYER: Now, one possible -- prior --
15 of the alien prior to removal. That's -- I'm just reading
16 it --

17 MR. STEWART: Although --

18 JUSTICE BREYER: -- from their cert petition.

19 MR. STEWART: I do -- I think you left out one
20 word that is -- is crucial, that is, his position
21 necessarily turns on the proposition that we have to get
22 acceptance not simply from the country, but from the
23 government of that country.

24 JUSTICE BREYER: But what the cert petition
25 says, without obtaining that country's acceptance of the

1 alien. Now, I grant you it's sort of a hidden argument
2 there, but it's mentioned or whatever. Is -- one reason
3 the answer to that question is no is because where that
4 country does not have a functioning government, it is not
5 a country within the meaning of country as used in this
6 statute.

7 MR. STEWART: I mean, we would submit --

8 JUSTICE BREYER: Now, that's -- that's an answer
9 no to the question presented for a very narrow reason that
10 does not get us involved in anything other than Somalia.
11 Is there -- I mean, maybe we shouldn't reach it because it
12 wasn't argued all that much, but it seemed to me just
13 another argument being advanced in favor of their
14 position.

15 MR. STEWART: Well, first, we would -- we would
16 submit that the question presented presupposes that
17 Somalia is a country.

18 But leaving that question aside, I think there
19 are a lot of good reasons that even if the Court felt this
20 issue was properly before it, it should hold that Somalia
21 is a country. If you go to the Department of State web
22 site, Somalia is listed as an independent state. It
23 continues to be a member state in the United Nations,
24 notwithstanding the absence of a functioning central
25 government. If Somalia were not regarded as a country or

1 a state, by reason of the absence of a government, then
2 presumably all people who were formerly Somali nationals
3 would now be rendered stateless, and that's a result that
4 international law generally --

5 JUSTICE BREYER: So you're not saying you can
6 dump people in Antarctica or possibly send them to the
7 moon.

8 MR. STEWART: We're saying that -- we're saying,
9 first, that Antarctica and Somalia are countries. It's
10 exceedingly --

11 JUSTICE BREYER: Antarctica is a country? So we
12 could take all these people, send them to Antarctica.
13 They'll live with the penguins? Is --

14 MR. STEWART: It's extremely unlikely that --
15 that the -- the text of a statute could ever be satisfied
16 because the permitted removal countries are countries such
17 as the country in which --

18 JUSTICE SCALIA: If they were born there --

19 MR. STEWART: Exactly.

20 JUSTICE SCALIA: -- raised by penguins, send
21 them --

22 (Laughter.)

23 MR. STEWART: So in any event, we -- we think
24 that Somalia is a country. It continues to be regarded as
25 such, notwithstanding the current lack of existence of a

1 functioning central government. There is a portion of
2 Somaliland -- of Somalia known as Somaliland that has set
3 up its own government and characterizes itself as a
4 separate country, but the United States Government has not
5 recognized that claim, nor has any other country. So
6 Somalia for these purposes remains intact.

7 I'd like to focus again on the text of the
8 relevant statutory provisions.

9 JUSTICE GINSBURG: Before you do so, could you
10 tell me what was the outcome in that Southern District of
11 Texas case which relied on this decision, the Eighth
12 Circuit's decision here, to send someone to Ethiopia
13 without consent?

14 MR. STEWART: I don't know what ultimately
15 happened to the alien. As the case is described in the
16 amicus brief, the alien was flown to Ethiopia. He was
17 refused at the border, and then he was flown back. And I
18 think that would be consistent with our representation
19 that we have not historically attempted to repatriate
20 aliens over the objection of a functioning central
21 government. That is --

22 JUSTICE GINSBURG: Is -- is there anything to it
23 other than the practical objection that when you get the
24 person there, the country won't accept him, so he's going
25 to -- be left with you --

1 MR. STEWART: I think it --

2 JUSTICE GINSBURG: -- unless we dump him in the
3 sea.

4 MR. STEWART: -- it's a measure of inconvenience
5 if he's flown there and back, but we would say that even
6 if the Court held that the statute requires acceptance by
7 the receiving country's government, it would not be
8 necessary for us to obtain a prior assurance of
9 acceptance. Rather, it would still be a permissible
10 option for us to fly the alien to the border, and if the
11 people there, having been told who he is, let in him, we
12 would say that qualifies --

13 CHIEF JUSTICE REHNQUIST: You don't fly him to
14 the border. You fly him to an airport which usually isn't
15 on the border.

16 MR. STEWART: I'm -- I'm sorry. Fly him to the
17 port of entry at which he would be presented to the -- the
18 immigration or customs officials in the relevant foreign
19 country, and if they acceded to his entry, having been
20 apprised of who he was, we would say that constitutes
21 acceptance by the receiving country's government.

22 JUSTICE BREYER: But that -- they can win on
23 that one because it doesn't say anything about prior in
24 (vii).

25 MR. STEWART: Right. I mean, here -- here the

1 barrier -- in a sense, the barrier is not so much
2 acceptance. That is, as a practical matter, in order to
3 accomplish removal of an alien to Somalia, we're going to
4 put him on a plane. He is going to be flown at an airport
5 in Somalia, and there will be people at the airport with
6 guns presumably who exercise de facto control over who
7 gets in and who is not allowed to deplane. And if those
8 people are not willing to let Mr. Jama into the country,
9 he'll be flown back and we won't be able to accomplish
10 repatriation.

11 JUSTICE SCALIA: Whether they are -- whether
12 they are a government or not.

13 MR. STEWART: The -- the barrier -- the
14 potential barrier is not that there won't be acceptance,
15 that there -- but that there won't be acceptance --

16 JUSTICE SCALIA: People with guns. Right.

17 MR. STEWART: -- there won't be acceptance by
18 people that we would regard as the government of Somalia.

19 And -- and I think there is a significant point
20 here in terms of the foreign relations of the United
21 States. That is, if the reconciliation process goes as we
22 hope and conditions in Somalia become more stable, the --
23 the people who purport to exercise governmental authority
24 gain control over the -- the territory and the consent of
25 the population, at a certain point the State Department

1 will have to make a decision, have things progressed far
2 enough that we can characterize this as the government of
3 Somalia. And that determination shouldn't be skewed by a
4 judicial ruling that until the State Department makes that
5 determination, repatriation of aliens to that country will
6 be prohibited.

7 If I could turn to the -- the text of the
8 statute, the provision on which we rely, of course, is --
9 is subsection (E)(iv) and that's at page 4 of the
10 Government's brief, and it's headed Additional Removal
11 Countries. It says, if an alien is not removed to a
12 country under the previous subparagraphs of this
13 paragraph, the Attorney General -- now the Secretary of
14 Homeland Security -- shall remove the alien to any of the
15 following countries. And Roman (iv) is the country in
16 which the alien was born. By its terms, that gives
17 unqualified approval to removal to the country of birth.
18 Neither the introductory language nor subsection -- or
19 clause (iv) itself conditions that authorization on
20 acceptance by the receiving country's government. And
21 it's also --

22 JUSTICE SOUTER: Mr. Stewart, may I interrupt
23 you? Oh, I'm -- may I interrupt you and ask -- ask this
24 question? You're right. Textually there's -- there's
25 nothing in (iv) that -- that has the condition of -- of

1 prior approval.

2 The argument -- one argument is made is that
3 because of the substantial overlap of -- of the
4 subsections in (E) with the country of -- of nationality
5 of citizenship in (D), that if you do not recognize a -- a
6 requirement of acceptance for the (E) categories,
7 basically you're going to do an end run around (D).

8 The Government's answer to that argument, as I
9 understand it, as -- as I tried to -- to put it in a
10 question to your -- your friend, is that there is no
11 absolute requirement of acceptance in (D). There is
12 simply a -- a -- the Attorney General's mandate to send
13 the person to a -- a country of citizenship is -- is
14 subject to that. But if the country will not accept, the
15 Attorney General still has discretion to send him to that
16 country.

17 There is one answer to that that your brother
18 did not get into, and I -- I want to raise it. As I
19 understand it, the House report for the -- what was it --
20 the '96 act, the current statute anyway. The House report
21 indicated that there was no intent to change the substance
22 of the provisions dealt with from what they had been under
23 the prior statute. And under the prior statute, which is
24 set out on -- on page 1a of the petitioner's brief, it
25 seems to me that it is very clear that there was an

1 absolute requirement of acceptance for the Attorney
2 General to act under the predecessor language to what is
3 now subsection (D). If you look down to within the -- the
4 three lines from the -- from the bottom of -- of page 1a,
5 which refers to that, there -- there seems to be a clear
6 condition: if such country is willing to accept him into
7 its territory.

8 Now, if I'm reading the old law right and the
9 House report does reflect or should be taken by us in
10 interpretation to reflect the intent of Congress, then
11 don't we have to say that the Attorney General's
12 authority, not merely mandate, but authority, under (D)
13 requires acceptance? And therefore, if we take your view,
14 we would, in effect, allow an end run around a condition
15 indeed because the Attorney General could simply say,
16 okay, I'm going to go to little (iv) under (E). I'm going
17 to find the country of the birth. I don't have to get
18 acceptance. It happens to be the same country as
19 citizenship. But -- but in he goes, or at least up to the
20 border he goes. What's your answer to that argument?

21 MR. STEWART: Well, let me -- let me turn the
22 Court first to page 3 of the Government's brief that has
23 the text of current subsection (D), and I think that maybe
24 that will help me to explain it best because the way we
25 would formulate our interpretation of subsection (D) is

1 very slightly different from the way that -- that you
2 characterized it earlier. Subsection (D) says: if an
3 alien is not removed to a country designated under
4 subparagraph (A)(i), the Attorney General shall remove the
5 alien to a country of which the alien is a subject,
6 national, or citizen unless the government of the country
7 fails to give its consent.

8 And our interpretation of the purpose of
9 subsection (D) is it expresses a strong preference for
10 removal to the country of nationality, assuming that no
11 designation has been made. But Congress recognized that
12 to make that an absolute requirement, even in
13 circumstances where there was no acceptance, would embroil
14 the executive branch into foreign policy confrontations
15 because essentially even when the executive branch
16 officials believed it would be an unwarranted affront to
17 foreign states to try to remove in the face of foreign
18 resistance, the statute, without the exception, would be
19 telling the Attorney General you have to do that. And so
20 Congress, understandably, enacted an -- an exception to
21 that requirement, and it says if there is no acceptance,
22 the Attorney General doesn't have to remove.

23 Now, we would -- we would --

24 JUSTICE SOUTER: So if -- if there is
25 acceptance, he does have to remove. If there is no

1 acceptance, he has discretion.

2 MR. STEWART: We -- we would say he has
3 discretion, but he -- but he has --

4 JUSTICE STEVENS: That doesn't make -- can I
5 interrupt here? I want to ask the question I started
6 before. That doesn't make any sense. If you read this as
7 a mandatory requirement, the Attorney General shall do it,
8 and if you assume an existing government -- now, you
9 narrowed the question. So I'm not talking about the
10 question. If there's an existing government, he cannot
11 command the other government to accept the alien. The
12 general practice among nations was they would not -- the
13 other nation has an obligation to accept people back. But
14 if they won't do it, we can't force them to take the
15 person back.

16 MR. STEWART: I -- I agree that that is
17 generally the international practice. Now, I would -- I
18 would not categorically promise --

19 JUSTICE STEVENS: How -- how could -- say you
20 send a person back to Great Britain and they say we're not
21 going to take him. How are you -- what -- what can --
22 what could the Attorney General possibly do?

23 MR. STEWART: I think as a practical matter in
24 that context, it would be impossible. But to take another
25 hypothetical situation --

1 JUSTICE STEVENS: So the word shall cannot mean
2 shall because he -- he cannot in every case do it.

3 MR. STEWART: Well, it says he shall do it
4 unless --

5 JUSTICE STEVENS: Unless there's acceptance.

6 MR. STEWART: Right. Unless there's acceptance.

7 JUSTICE SOUTER: I guess you could say that he
8 shall do everything he possibly can, but his mandate to do
9 that evaporates if there's no acceptance.

10 MR. STEWART: That's correct.

11 JUSTICE SCALIA: Wait a minute. We're --
12 we're --

13 JUSTICE SCALIA: We're going too far. It
14 doesn't just say if they refuse to accept. If they don't
15 respond within 30 days. So it may well be that you --
16 that you can proceed to (E) with respect to a -- a country
17 that simply has not responded.

18 MR. STEWART: That -- that's --

19 JUSTICE SCALIA: It has an inefficient ministry
20 of state, and -- and the guy arrives. They say, oh, we're
21 -- we're delighted to have this fellow back. Our response
22 got lost in the mail or something. There's no -- no
23 reason you can't proceed to (E) just because of the
24 existence of (D).

25 MR. STEWART: That -- that's correct.

1 JUSTICE BREYER: But now, putting those three
2 questions together, it seemed to me what you're saying it
3 is possible to read the statute the way you're saying. It
4 is also possible to read the statute the opposite. And
5 the brief that I found very helpful on this was this Ali
6 Ali brief where everything is set out really quite
7 parallel. You get every version of the statute right in
8 front of you. And as I read that, it -- you look at the
9 '52 version -- and I think it's clearer on this point, and
10 it's against you insofar as it's clearer.

11 But then, in addition, you have four circuit
12 courts of appeals, including a decision by Learned Hand,
13 all of whom say that Justice Souter's suggestion there is
14 what the statute means, and there's nothing to the
15 contrary.

16 And then after that, Congress reenacts those
17 same statutes with all the little bits and I think some
18 unclarifying changes in language, but they write in the
19 report, we don't mean any substantive change by this.

20 JUSTICE SCALIA: I think the House wrote that in
21 the report. Right? Was that in the Senate report?

22 MR. STEWART: I don't remember.

23 JUSTICE SCALIA: Did the President know about --

24 JUSTICE SOUTER: It -- it was the House report.

25 JUSTICE BREYER: Some people actually read those

1 reports and feel they are a clue to what Congress is
2 trying to get at. And here, if that is a clue, the clue
3 says that there is to be no substantive change from a
4 provision that was unanimously interpreted by four
5 circuits, including Learned Hand, to be with the other
6 side on this.

7 MR. STEWART: Well, first --

8 JUSTICE BREYER: So I'm interested --

9 MR. STEWART: Well, first, there were only two
10 court of appeals decisions that we've been pointed to in
11 which the attempt remove an alien was actually thwarted on
12 the basis that there had been a no acceptance by the
13 receiving country's government.

14 Second, Learned Hand was unquestionably a
15 distinguished judge, but if he had been infallible, then
16 presumably he would have been on this Court.

17 (Laughter.)

18 MR. STEWART: And I think -- I think --

19 JUSTICE BREYER: That is an amazing non
20 sequitur.

21 JUSTICE SCALIA: Good point. Good point.

22 (Laughter.)

23 JUSTICE SOUTER: If you believe that, Mr.
24 Stewart --

25 MR. STEWART: And I think -- and I think --

1 but --

2 JUSTICE SCALIA: You -- you mean if he had been
3 on this Court, he would have been infallible.

4 (Laughter.)

5 MR. STEWART: Exactly, exactly, exactly,
6 exactly.

7 The -- the point is for this Court to treat as
8 any lower court opinion as an authoritative statement of
9 what the law means or meant would be an inversion of our
10 judicial --

11 JUSTICE SOUTER: Okay. Let's -- let's erase
12 Learned Hand --

13 JUSTICE STEVENS: Let me just -- let me get an
14 answer to my question. In your -- under your reading of
15 the statute, the mandatory -- it imposes a mandatory duty
16 on the Attorney General which he may not be able to
17 perform because he may not be able to repatriate the alien
18 unless the other country will accept him.

19 MR. STEWART: No. Our -- our point is that the
20 statute would have raised that concern if the exception
21 were not there. That is, if the statute said in terms if
22 there is no removal to the country designated, the
23 Attorney General shall remove the alien to his country of
24 citizenship or nationality and didn't include an
25 exception, then the Attorney General would be placed in a

1 situation, at least potentially, where he was forced -- he
2 felt himself forced by law to attempt repatriation even
3 though he knew that the government of that country didn't
4 accept the alien's return. And it was to prevent that
5 sort of foreign policy confrontation that the exception
6 was written in. The exception was, by its terms, an
7 exception to a mandate. It was not intended to be --

8 JUSTICE STEVENS: Well, then it's an exception
9 to subparagraph (iv).

10 MR. STEWART: It's an exception to subparagraph
11 (iv) -- to subparagraph --

12 JUSTICE STEVENS: So you are reading the
13 language in subparagraph (vii) as a -- an exception to
14 subparagraph (iv).

15 MR. STEWART: No. I'm reading the language of
16 subsection (D). I'm -- I'm not at (E). I'm at subsection
17 (D).

18 JUSTICE STEVENS: I'm at (E). I'm at (E).

19 MR. STEWART: Okay.

20 JUSTICE STEVENS: And I'm saying if you read (E)
21 your way, subsection (iv) is a mandatory command to the
22 Attorney General that he may not be able to carry out
23 unless he can comply with subsection (vii).

24 MR. STEWART: We're not saying that subsection
25 (E)(iv) is a mandate that the Attorney General or the

1 Secretary must remove to --

2 JUSTICE STEVENS: It says shall remove.

3 MR. STEWART: It says shall remove to one of the
4 following countries, but it clearly is not intended to be
5 a mandate because the introductory --

6 JUSTICE STEVENS: He can choose one of them.

7 MR. STEWART: -- the introductory -- he doesn't
8 have to choose one because the introductory language of
9 Roman (vii) says, if impracticable, inadvisable, or
10 impossible to remove the alien, dot, dot, dot.

11 JUSTICE STEVENS: Right.

12 MR. STEWART: So it specifically contemplates
13 the possibility that situations may arise in which it will
14 not be practicable, possible, or advisable to remove the
15 alien to any of the foregoing countries. `And certainly
16 one --

17 JUSTICE STEVENS: And wouldn't it always be
18 impossible if -- if the -- if the other country will not
19 accept the alien?

20 MR. STEWART: I think -- I mean, to -- to give a
21 slight variance on the hypothetical that Justice Scalia
22 posed, if a future --

23 JUSTICE STEVENS: I'd rather have an answer to
24 my question.

25 MR. STEWART: I think it would not always be

1 impossible. If, for instance, a future president of
2 Mexico embarked on an aggressive program of encouraging
3 aliens -- encouraging Mexican nationals to leave that
4 country illegally, and then the Mexican government refused
5 to take them back, I think it would at least be possible.
6 It would be an option the President would want to consider
7 to repatriate those people over the objection of the
8 Mexican government. And if the President were attempting
9 to negotiate a satisfactory resolution to that very
10 hypothetical crisis, we wouldn't want him to be hamstrung
11 by a statutory barrier to his doing that.

12 So it makes perfect sense to say, on the one
13 hand, if there is no acceptance by the receiving country's
14 government, the Secretary will never be required to remove
15 to that country because that would enmesh the executive
16 branch in an international confrontation against its will.
17 It's not at all inconsistent to say, nevertheless, if the
18 Secretary believes that repatriation without acceptance
19 can be done, consistent with the foreign relations
20 objectives of the -- the United States Government, it's a
21 statutory option. As a practical matter --

22 JUSTICE SOUTER: May -- may I go back to, let's
23 say, the -- the nub, the narrow nub of -- of my earlier
24 question, and that is this. The predecessor language to
25 what is now subsection (D), as I read it, clearly required

1 the approval of the country if there was to be a removal
2 to the country, a repatriation to the country. The House
3 report says we don't intend to make any change in the
4 substantive law.

5 If we accept the House report, then we've --
6 we're going to say that the proper reading of (D) is not
7 your reading, but the reading that says the Attorney
8 General cannot act under (D) unless there is, in fact, an
9 -- an acceptance by the country. And if that is true,
10 then your reading of Roman (iv) in (E) allows you to make
11 an end run around that condition, and that would be a good
12 reason for interpreting all of (E) to require agreement
13 and acceptance by the country.

14 What is your response to that narrow argument?

15 MR. STEWART: I guess we'd have two responses.
16 The first is we would not agree with the view that the
17 predecessor language would forbid removal to the country
18 of nationality absent acceptance because what the statute
19 said was that if the government of the relevant foreign
20 country doesn't accept or doesn't advise the Attorney
21 General of what its stance is, then about five or six
22 lines down on page 2a, it says, then such deportation
23 shall be directed by the Attorney General within his
24 discretion and without necessarily giving any priority or
25 preference because of their order as herein set forth

1 either -- and then there's the same series of countries,
2 and one of those is the country in which the alien was
3 born.

4 JUSTICE SOUTER: So you're saying that the
5 predecessor language can be read the same way, you say,
6 (D) can be read now.

7 MR. STEWART: That's correct. I guess the other
8 point we would make is --

9 JUSTICE GINSBURG: Then you -- you think Judge
10 Reavley, who was sitting on the Ninth Circuit at the time
11 and dissented in the Ali Ali case, that he was dead wrong
12 when he said the prior statute did condition willing
13 acceptance for all countries to which aliens could be
14 deported.

15 MR. STEWART: Yes. We would -- we would
16 disagree with that statement.

17 JUSTICE GINSBURG: He thinks -- his dissent
18 turns on a difference between the current statute and the
19 prior statute.

20 MR. STEWART: Yes. We would disagree that that
21 was the appropriate result under the prior statute.

22 The -- the other thing we would say about this
23 point is that if we are otherwise correct about subsection
24 (E)(iv), that is, if as a general matter, subsection
25 (E)(iv) says an alien may be removed to the country of his

1 birth whether or not there was acceptance, then it would
2 make no sense to say but you can't do it if that is also
3 his country of current nationality or citizenship because
4 removal to the country of -- the current -- the country of
5 current nationality or citizenship is a preferred country
6 of removal. That's so not only the -- under the statutory
7 scheme, but it's also the country that under international
8 law has an obligation --

9 JUSTICE SCALIA: I haven't followed you. Would
10 you say -- make that argument again?

11 MR. STEWART: Well, I think petitioner's
12 reliance on subsection (D) is to the effect that however
13 you would otherwise read subsection (E), subsection (D)
14 deals specifically with removal to the country of
15 nationality or citizenship, and if you don't meet the
16 prerequisites for removal to that country under (D), then
17 you can't do an end run by resorting to (E). And I'm
18 saying if that works at all, it could work only when (E)
19 is invoked to authorize removal to the country of current
20 nationality or citizenship. It -- (D) couldn't have any
21 negative implications if we were attempting to remove
22 somebody to Somalia because he was born there even though
23 he was currently a national or citizen of a different
24 country.

25 JUSTICE SCALIA: That's -- that's not one of the

1 choices under (E). It doesn't -- (i) through (vii) don't
2 include the state of nationality.

3 MR. STEWART: They -- they don't include that,
4 but as a practical matter, I think the state of
5 nationality is -- is always or virtually always going to
6 be covered because they include country of birth, country
7 from which the alien departed to enter the United States,
8 country in which he previously resided, country of --
9 that's under the sovereignty of -- that exercises
10 sovereignty over the country in which he was born.

11 One reason for -- possible reason for parsing it
12 the way Congress did in (E) is that sometimes the reason
13 that a foreign government doesn't give acceptance may be
14 that the foreign government disputes our contention that
15 this individual is a national of its country, and in order
16 to avoid a recapitulation of that dispute at the
17 subsection (E) stage, Congress might, at least, have
18 thought (E) is going to turn on objective factors, factors
19 that are unlikely to be the subject of dispute, and not on
20 the potentially contested question of what country is the
21 -- the alien's current country of nationality.

22 The -- the other thing I'd like to say about the
23 -- the two policy justifications that petitioner has
24 given. The one is that this -- his reading of the statute
25 is necessary in order to prevent the -- this Government

1 from being entangled in foreign confrontations. And --
2 and our view is that the executive branch is well equipped
3 to prevent that from happening. That is, so long as the
4 statute doesn't require us to attempt repatriation over
5 the objection of another foreign government, the executive
6 branch is -- can and will exercise discretion to attempt
7 that course of action only when we believe that it's
8 consonant with the foreign policy goals of the -- the
9 United States.

10 The other policy objection to our reading that
11 petitioner advances is that places without functioning
12 central governments are likely to be dangerous and that
13 Congress would have wanted to prohibit removal to an -- a
14 country where the alien would face hardships. And we
15 don't attempt to minimize the potential for hardship if an
16 alien is removed to Somalia, but there is a network of
17 Federal statutory provisions that specifically address the
18 question of resistance to removal based on the potential
19 for harm in the receiving country. And if petitioner
20 can't qualify under any of those, then it's unlikely that
21 Congress would have intended the absence of a functioning
22 central government to serve as a sort of prophylactic or
23 surrogate for dangerous -- dangerousness.

24 And it's worth noting in that respect that the
25 Secretary of Homeland Security currently administers the

1 temporary protected status program which covers Somalia.
2 It contains broad protections for removal of aliens there,
3 but petitioner is ineligible for relief under that
4 provision because of his criminal conviction.

5 Thank you, Your Honor.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Stewart.

8 Mr. Keyes, you have 3 minutes remaining.

9 REBUTTAL ARGUMENT OF JEFFREY KEYES

10 ON BEHALF OF THE PETITIONER

11 MR. KEYES: I would like to respond by pointing
12 out that on the -- on the point that Justice Souter raised
13 with respect to the language of the statute prior to 1996,
14 my -- my brother counsel did not quote the most important
15 part of the statute that was in effect at that time. It's
16 set forth on -- on 6a of the brief for petitioner. And
17 the critical part says, thereupon deportation of such
18 alien shall be directed to any country of which such alien
19 is a subject, national, or citizen if such country is
20 willing to accept him into its territory. That same
21 language did not just appear in the statute just prior to
22 1996. That was the language that was in the statute in
23 1952 when it was first passed, and that can be found on
24 page 1a to 1b of -- of our brief.

25 I would also like to point out that we can -- in

1 terms of -- of interpreting this statute, it's also
2 helpful to look at other statutes that were passed in
3 1996, specifically in the alien terrorist statute where
4 the Government is -- gets to remove someone who's been
5 classified as an alien -- alien terrorist. That statute,
6 which is 8 U.S.C. 1537(b), starting on page 8a of our
7 brief, says specifically that an alien terrorist shall be
8 removed to a country whose government is willing to accept
9 that alien.

10 I would submit that this, if in fact, Congress
11 is going to have -- if we're going to have this removal
12 requirement applies clearly to alien terrorists, then
13 certainly this demonstrates that this has -- this
14 requirement has always been part of that statute. And in
15 1996 Congress had before it those consistent
16 interpretations.

17 Congress also had before it in 1996 the fact
18 that tens of thousands of aliens could not be deported
19 over the years to countries that would not accept them.
20 And in 1996, it restated the statute, having those facts
21 and also the consistent judicial history which interpreted
22 the statute to always require acceptance. As a result of
23 that, we could apply the principle that there was no
24 watchdog barking in the night.

25 Thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Keyes.

2 The case is submitted.

3 (Whereupon, at 11:58 a.m., the case in the
4 above-entitled matter was submitted.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25